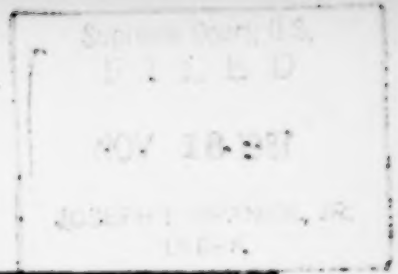


87-894^①

No.



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ARNOLD H. SLYPER AND MARCO BAQUERO
PETITIONERS

V.

ATTORNEY GENERAL AND DIRECTOR,
UNITED STATES INFORMATION AGENCY

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Whether the court of appeals erred in finding that it lacked subject matter jurisdiction to review for abuse of discretion a decision of the United States Information Agency (USIA), pursuant to Sec. 212(e) of the Immigration and Nationality Act, 8 U.S.C. 1182(e), requiring an exchange visitor to return to his home country for two years, despite a finding by the Immigration and Naturalization Service (INS) that such enforced return would impose exceptional hardship on the exchange visitor's American wife.

2. Whether the court of appeals, while acknowledging that such decisions of the USIA could be reviewed on a "colorable claim of constitutional, statutory, or regulatory violation" erroneously found that such a claim had not been presented in the instant case.

3. Whether, in denying the applications for waiver of the home country residence requirement

despite the demonstrated hardship to the American wives of the petitioners, the USIA pursued improper procedures constituting a violation of due process and relied on an erroneous conclusion that the applicable statutes and the legislative intent required it to deal harshly with family hardship waiver applications submitted for foreign doctors.

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TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

The above named petitioners hereby petition
for a writ of certiorari to review the judgment of
the United States Court of Appeals for the District
of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*) is reported at 827 F. 2d 921. The opinion of the District Court (App. B, *infra*) is not reported.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*) was entered on September 4, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Sec. 212(e) of the Immigration and Nationality Act, 8 U.S.C. 1182(e), provides:

(e) No person admitted under section 101(a) (15)(J) of this title or acquiring such status after admission (i) whose participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an

agency of the Government of the United States or by the government of the country of his nationality or his last residence, (ii) who at the time of admission or acquisition of status under section 101(a)(15)(J) of this title was a national or resident of a country which the Secretary of State, pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged, or (iii) who came to the United States or acquired such status in order to receive graduate medical education or training, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 101(a)(15)(H) or section 101(a)(15)(L) of this title until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States: Provided, that upon the favorable recommendation of the Secretary of

State, pursuant to the request of an interested United States Government agency, or of the Commissioner of the Immigration and Naturalization Service after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawful resident alien), or that the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion, the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest:

And provided further: that, except in the case of an alien described in clause (iii), the Attorney General may, upon the favorable recommendation of the Secretary of State, waive such two-year foreign residence requirement in any case in which the foreign country of the alien's nationality or last residence has furnished the Secretary of State a

statement in writing that it has no objection to such waiver in the case of such alien.

5 U.S.C. 701(a) provides:

This chapter applies, according to the provisions thereof, except to the extent that --

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law, 5 U.S.C. 702 provides, in part:

A person suffering legal wrong or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. 706(2)(A) provides, in part:

That a reviewing court may set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;"

22 CFR 514.32 provides, in part:

Upon receipt of a request for a recommendation of waiver of the home-country physical presence requirement of section 212(e), of the Immigration and Nationality Act, as amended, the Director (of USIA) will review the policy, program, and foreign relations aspects of the case and will transmit a recommendation to the Attorney General for decision.

STATEMENT

1. Exchange visitors, designated by symbol J-1, are one of 14 categories of temporary entrants authorized by Sec. 101(a)(15) of the Immigration and Nationality Act (IN Act), 8 U.S.C. 1101(a)(15). Legislation enacted in 1970 ^{1/} precluded the attainment of lawful permanent residence in the United States by two categories of exchange visitors, ^{2/}

^{1/} Act of April 7, 1970, P.L. 91-225, 84 Stat. 114.

^{2/} Those whose visits were government financed or whose skills appeared on a list published by the Secretary of State.

until they had returned to their home country and been physically present there for two years (the home country residence requirement). Foreign doctors, coming to the United States for graduate medical education, were added in 1976 as a third category of exchange visitors subject to the home country requirement. ^{3/}

The 1970 legislation prescribed four grounds upon which a waiver of the home country requirement could be granted: (a) at the request of an interested government agency; (b) upon a showing that this requirement would impose exceptional hardship on the exchange visitor's American citizen or alien resident spouse or child (the exceptional hardship waiver); (c) if the home country stated it had no objection to the exchange visitor's continued residence in the United States (the no objection statement); or (d) if the exchange visitor would be subject to persecution in the home country. The 1976

^{3/} Act of Oct. 12, 1976, P.L. 94-484, 90 Stat. 2243.

Amendment eliminated the no objection statement as a ground for waiver on behalf of foreign doctors, but made no alteration in the other three grounds for waiver, including the provision for an exceptional hardship waiver.

2. Both petitioners are foreign doctors who entered the United States as exchange visitors, who thereafter married American citizens, whose wives have each given birth to two American citizen children, and who have applied for exceptional hardship waivers of the home country residence requirement.

The somewhat obscure procedural provisions of Sec. 212(e) of the IN Act for the procurement of exceptional hardship waivers were analyzed in Silverman v. Rogers, 437 F. 2d 102 (1st Cir. 1970) to envisage a 3-step process: - (a) a finding by INS of exceptional hardship to the exchange visitor's American family; a favorable recommendation thereafter by the United States Information Agency

(USIA); ^{4/} and grant of the waiver by INS. The Silverman analysis was adopted by the courts below and is not in dispute here.

The background of the waiver applications of the two petitioners is separately described below.

Dr. Arnold H. Slyper (Slyper), a native and citizen of Great Britain, was admitted to the United States as an exchange visitor on July 12, 1979 (J.A. 8).^{5/} In issuing the J-1 visa to Slyper, the American consul in Toronto, Canada erroneously certified that Slyper was not subject to the home country residence requirement. J.A. 8.

After his admission to the United States, Slyper married Judith Blech (Judith), a native-born American citizen. A year later, Judith gave birth to a daughter who is also a native-born American

^{4/} The functions of the Secretary of State under this statute were transferred to the USIA. See Reorganization Plan No. 2 of 1977, House Doc. 95-243 and Act of Aug. 24, 1982, P.L. 97-241, 96 Stat. 273.

^{5/} J.A. reference are to the Joint Appendix in the court below.

citizen. J.A. 8. Thereafter Slyper filed with INS an application for waiver of the home country residence requirement on the ground that compliance would visit exceptional hardship on Judith, his American-citizen wife. J.A. 9. The alleged hardship consisted of the interruption of Judith's professional career as a research chemist, the serious economic consequences of a move to England, the emotional impact on Judith of a prolonged separation from her family, and the reliance on the erroneous advice from the American consul by Judith and Slyper in planning their marriage. See Slyper v. Attorney General, 576 F. Supp. 559, 560-561 (D.D.C. 1983).

The waiver application was denied by INS on the ground that exceptional hardship had not been established. This determination was challenged by a suit for declaratory judgment and injunction. On December 22, 1983 the district court found that INS had abused its discretion in ruling that exceptional hardship had not been established, and remanded the matter to INS for further pro-

ceedings. Slyper v. Attorney General, supra.

INS then forwarded the waiver application to the district court's opinion to USIA for a recommendation whether a waiver should be granted. Shortly thereafter, USIA recommended to INS that the waiver be denied, stating, J.A. 10.

"It is noted that INS did not make a finding of hardship but merely forwarded Judge Greene's opinion and order with the I-613 request for a recommendation. It is considered that what hardship may exist does not outweigh the program and policy consideration of the Exchange Visitor Program and the Congressional intent of Public Law 94-484."

INS thereafter denied the waiver application, on the ground that USIA had failed to make a favorable recommendation, and stating that such a favorable recommendation is a statutory prerequisite to the grant of a waiver. J.A. 10.

Slyper's counsel then sought to persuade USIA to reconsider its refusal to recommend, pointing to the Vice consul's erroneous assurance that Slyper would not be subject to the two-year foreign residence requirement, and urging that Slyper consequently "cannot be charged with reneging on an obligation he did not knowingly undertake." J.A.

11, 20. USIA responded that "we are not disposed to change our original recommendation." Slyper's counsel then wrote to USIA, requesting a statement of the basis for their decision. USIA responded declining to furnish any further particulars.

J.A. 11, 22a, 23.

The district court then granted permission to file an amended complaint, joining the USIA as an additional party. Thereafter USIA made a motion to dismiss the amended complaint on the ground that the district court lacked subject matter jurisdiction to review the USIA determination. J.A. 24. The district court granted the motion. J.A. 25.

Marco Baquero is a doctor, native and citizen of Ecuador, and duly licensed to practice medicine in that country. J.A. 27. He entered the United States as a visitor in 1981, and a month later his status was changed to exchange visitor, so that he could engage in a program for advanced medical training. J.A. 27.

During his medical training Baquero met and eventually married Jean Walsh (Jean), an institutional dietitian, who is a native-born citizen of the United States. J.A. 27. In 1983 Jean filed with INS, as authorized by Sec. 204(a) of the IN Act, 8 U.S.C. 1104(a), a petition to accord immediate relative immigration status to her husband, Baquero. That petition was approved by INS several months later. J.A. 27.

In 1984 Baquero filed with INS an application for waiver of the two-year foreign residence requirement to which he was subject as an exchange visitor, so that he could continue living with his citizen wife in the United States. The waiver application was accompanied by voluminous documentation showing that compliance by Baquero with the two-year foreign residence requirement would subject Jean to extraordinary medical, emotional, cultural, economic, and professional hardships. J.A. 29, 35 et seq.

INS found that exceptional hardship to Jean had been adequately established, and forwarded the waiver application to the USIA, asking the USIA for its recommendation. J.A. 29, 60. USIA thereafter recommended that the waiver be denied, and stated, J.A. 29, 60:

"The USIA has determined that the program and policy considerations of the Exchange Visitor Program outweigh the hardship alleged for the American citizen spouse."

USIA never informed Dr. and Mrs. Baquero of their determination and never gave them an opportunity to dispute it.

INS thereafter notified Baquero that - J.A. 29, 61:

"The United States Information Agency has recommended that the request for a waiver be denied because the program and policy considerations of the Exchange Visitor Program outweigh the hardship claimed for the American citizen spouse. The Service concurs in the recommendation, and the waiver is hereby denied."

Dr. and Mrs. Baquero have never been told what program and policy considerations outweigh the demonstrated hardships to Jean, the American citizen wife.

Baquero then brought suit against the Attorney General and the USIA, contending that the unfavorable recommendation of the USIA and the INS concurrence in that determination were an abuse of discretion and were based on an erroneous belief that Congress intended that they should deal harshly with waiver applications submitted by doctors, based on exceptional hardships to American spouses. J.A. 26. The district court dismissed the complaint sua sponte on the basis of its decision in the Slyper case a day earlier, finding that it lacked subject matter jurisdiction to review determinations by USIA. J.A. 63.

Slyper and Baquero then appealed to the court of appeals for the District of Columbia Circuit. Because of their common legal issues, the appeals were consolidated for briefing and oral argument.

On September 4, 1987 the court of appeals affirmed the dismissal of the complaints, declaring that "Congress intended to vest maximum discre-

tion in the Director (of USIA) to oppose waivers requested by visiting physicians." Without citing any supporting legislative expression, the court asserted that: "This broad delegation of discretionary authority is 'clear and convincing evidence' of congressional intent to restrict judicial review in cases such as that we now face."

The court of appeals acknowledged that USIA waiver decisions could be subject to review on a colorable claim of "constitutional, statutory, or regulatory violation," but that petitioners had made no such claim and had charged merely an abuse of discretion. The court stated that it was ruling merely that the district court lacked subject matter jurisdiction to review the two USIA decisions for abuse of discretion. It acknowledged that there was a division in the circuit courts on this issue, with the Ninth and Second Circuits sharing its view and the Third Circuit opposed.

REASONS FOR GRANTING THE PETITION

This case presents an important question of first impression in this Court. It concerns the amenability of the USIA to judicial review in discharging its adjudicative functions under the immigration laws.

The ruling of the court of appeals that the district court lacked jurisdiction to entertain a challenge to the legality of the USIA's denial of a waiver was an indefensible abdication of the judicial function. In effect, it found that in acting on waiver applications the USIA has an unsailable license to act cruelly, irrationally, unfairly, and arbitrarily, that it does not have to give any reasons for its determinations, and that no court is authorized to question such abuses of its authority.

In arriving at this extraordinary conclusion, the court below has misread that applicable statutes and the decisions of this court. Moreover, it acknow-

ledges that its holding is contrary to the Third Circuit's decision in Chong v. USIA, 821 F. 2d 171 (3rd Cir. 1987). The issue presented in this case is thus one of national importance, involving hardships for many American families and presenting a conflict in circuits. A resolution by this court is urgently required.

1. In ruling that USIA decisions are not subject to judicial review, the court of appeals has misread several decisions of this court. The guiding principle was expounded in Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967), which declared that there is a strong presumption favoring judicial review of agency action, unless there is clear and convincing evidence that Congress intended to foreclose such review. That cardinal principle has been repeated by this court and by the lower courts on many subsequent occasions.

In seeking to avoid the thrust of this maxim, the court of appeals asserted that the grant to USIA of broad discretionary power furnished "clear

and convincing evidence" of a desire to bar judicial review. Not a single iota of specific evidence to support such a Congressional intention is offered in the opinion of the court of appeals, and we are aware of none. In the absence of such evidence, the presumption of reviewability must be applied.

The court of appeals next relied on the familiar dictum in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 403, 410 (1971). In that case, the court found an administrative decision reviewable. It referred to the presumption favoring reviewability, and a dictum described the rare situations where review might be precluded as "a very narrow exception" that might be invoked when "there is no law to be applied."

The finding that "there is no law to apply" in the instant case disregards the actual situation of the exchange visitor legislation as an integral provision of the Immigration and Nationality Act. In its earlier decision in Abourezk v. Reagan, 785 F. 2d 1043 (D.C. Cir. 1986), affirmed by an

equal division of this court on Oct. 19, 1987, the court below confronted a contention that "there is no law to apply" in exercising discretionary authority under Sec. 212(a)(27) of the IN Act, 8 U.S.C. 1182(a)(27). The court ruled that the Immigration and Nationality Act listed 33 grounds of exclusion to guide the Secretary's exercise of discretion.

In the instant case, the court of appeals sought to distinguish Abourezk by asserting that the statute "provided explicit guidelines for its exercise of discretion." But Sec. 212(e) is a segment of the same statute (and indeed of the same section) which provided guidelines in Abourezk, and the policies expressed in that comprehensive statute equally provide guidance here.

Moreover, an adequate and self-sufficient foundation for the exercise of the USIA's discretion is provided by Sec. 212(e) of the IN Act and the implementing regulations. Sec. 212(e) sets forth categories of exchange visitors subject to the home country requirement and the specific grounds for the

waiver of that requirement. 22 CFR 514.32 states that in exercising its waiver function the USIA will "review the policy, program, and foreign relations aspects of the case." We suggest that the statute and the regulation manifestly designate the "law to apply" in the exercise of discretion. The issue in this litigation is not an absence of guiding law but rather the manner in which that law has been administered.^{6/}

2. The hypothesis that discretionary determinations authorized by statute cannot be reviewed unless there are fixed criteria for the exercise of discretion overlooks the nature of discretionary action, and the need for flexibility in assessing particular facts. The immigration laws are replete with grants of discretionary authority in the most expansive terms.

^{6/} The reliance of the court of appeals on *Heckler v. Chaney*, 105 S. Ct. 1649, 1655 (1985) is also misplaced. This court's observations in that case dealt with an agency decision not to prosecute and are irrelevant to administrative decisions which adjudicate individual rights and benefits.

A notable example is Sec. 244(a) of the IN Act, 8 U.S.C. 1254(a), which provides that the Attorney General "may, in his discretion, suspend deportation" of aliens who meet prescribed pre-conditions. Similar unrestricted grants of authority appear throughout the IN Act.

Despite the absence of specific statutory guidelines, the exercise of such discretion is frequently reviewed by the courts. See 2 Gordon and Rosenfield, Immigration Law and Procedures, Sections 8.15 and 8.23. An example of such review is INS v. Rios-Pineda, 471 U.S. 444, 105 S. Ct. 2098, 2103 (1985) where this court observed that "unreasoned or arbitrary exercise of discretion" was a proper subject for judicial review, but concluded, after careful review of the record, that there had been no abuse of discretion.

The USIA concededly is performing a discretionary function in considering waiver applications. The court below specifically ruled that the USIA is

immune to any challenge for abuse of that discretion. As we have noted, the court conceded that this ruling is directly opposed to that of the Third Circuit in Chong v. USIA, 821 F. 2d 171 (3rd Cir. 1987). While the court asserted that two other circuits are in accord with its holding, the extent of that concurrence is uncertain. In both of those cases, unfavorable district court decisions had forced the USIA to produce its records revealing the basis for rejecting the waiver applications. After reviewing the records, "in the context of a given complaint," the court in Abdelhamid v. Ilchert, 774 F. 2d 1447, 1450 (9th Cir. 1985) found that "the alleged abuse of discretion consists only of the making of an informed judgment by the agency." In Dina v. Attorney General, 793 F. 2d. 473 (2d Cir. 1986) the panel's opinion did express the view that the USIA waiver decision was not reviewable. However, Judge Oakes, in concurring, found that the USIA decision was subject to review for abuse of discretion. After examining

the record, he concluded that there had not been an abuse of discretion. 793 F. 2d at 477-478.

There is thus a diversity of opinion in the lower courts in addressing an issue of national importance. We submit that an expression by this court is needed for the guidance of the lower courts, as well as the interested agencies and litigants.

The reliance by the court of appeals on the APA to support its hypothesis of unreviewability is incomplete and misguided. 5 U.S.C. 701(a)(2) precludes reviewability "to the extent that agency action is committed to agency discretion by law." (emphasis added). The extremely narrow compass of this preclusion is demonstrated by an examination of the APA in totality, which was not attempted by the court below.

A second part of the statutory pattern is 5 U.S.C. 702, which directs that "a person suffering legal wrong because of agency action, or adversely affected by agency action within the meaning of a relevant

statute, is entitled to judicial review thereof." A third part is 5 U.S.C. 706, which authorizes the reviewing court to decide all relevant questions of law, interpret all constitutional and statutory provisions, and, as stated in clause (2)(A), to set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Also relevant is 5 U.S.C. 551, which broadly defines "agency" to mean "each authority of the Government of the United States," with specified exceptions not including the USIA.

Read together as part of an integrated statute, these provisions mean that the USIA, like other government agencies, is subject to judicial review of its waiver denials at the behest of an aggrieved or adversely affected party, and that while the court cannot review the decision "to the extent that" it involves the exercise of discretion (in other words, the court cannot substitute its discretion for that of the USIA), it can determine

whether there has been an error of law or an abuse of discretion.

3. In finding itself powerless to review the waiver rejections by the USIA, the court thus misconceived its statutory function. Indeed, the court of appeals ignored or rejected the following specific grounds for judicial intervention.

a. Statutory misconstruction. The court of appeals incorrectly stated that neither petitioner had made any claim of statutory violation. Actually, the complaints in both cases alleged that the USIA has misread the applicable legislation and the legislative intent in denying the waivers, despite the exceptionally hardships to the American families. (J.A. 12, 30). This issue was extensively argued in the briefs^{7/} and it was the sole issue discussed by both counsel in the oral argument before the court of appeals. Indeed, our contention that the

^{7/} Appellee's brief, p. 28-34; Appellant's reply Brief, p. 17-20.

USIA has erred in its interpretation of the statutory language and purpose has been a major aspect of our challenge from the outset.

In these cases and in other litigations, and in public statements by USIA officials, USIA has expressed the view that that statutory amendments relating to foreign medical graduates enacted by the Health Professions Educational Assistance Act of October 12, 1976, P.L. 94-484, 90 Stat. 2243 (the Doctors Act) evidence a Congressional desire for severity in considering waiver applications by foreign doctors based on exceptional hardship to an American spouse or child. It is true that the Doctors Law imposed two additional restrictions on exchange visits by foreign doctors: - (1) it added them as a third class of exchange visitors subject to the home country residence requirement; (2) it precluded waivers for such doctors based on so-called "no objection" statements by their home countries. But the Doctors Law did not amend the statutory provision authorizing waivers because of exceptional

hardship to American families, which has been unchanged in the statute since its original adoption in 1961. And there is no suggestion in the language of the statute or its legislative history ^{8/} of a Congressional wish to modify the concern for the protection of family relationships which is a dominant concern of our jurisprudence. ^{9/} In fact, the legislative desire to protect family unity is emphasized in many provisions of the immigration laws. ^{10/}

^{8/} The USIA has stated in the court below (see USIA brief, p. 33-34) and on other occasions that its rigid approach to waiver applications by foreign doctors stems from a colloquy between Congressman Mazzoli and the USIA Associate General Counsel at a 1981 legislative hearing on a proposal to extend authorized periods of stay for foreign medical residencies to 7 years. Congressman Mazzoli obviously had second thoughts, since the extension was enacted without change, and Congressman's Mazzoli's off-hand observations were not repeated in the legislative reports or in the floor debates. This sequence of events hardly supports the view of legislative purpose adopted by the USIA.

^{9/} See Zablocki v. Redhail, 434 U.S. 374, 384, (1978) (right to marry is a fundamental constitutional right and impairments of marital status are subject to strict scrutiny).

^{10/} E.g., IN Act, Sec. 201, 8 U.S.C. 1151 (quota exemption); Sec. 212(g), (h), (i), 8 U.S.C. 1182(g), (h), (i) (waivers).

The USIA thus has misread the statute and the legislative purpose in concluding that Congress intended that waiver applications by foreign doctors based on family relationships should be dealt with more severely than similar applications by other exchange visitors. Their pursuit of that mistaken policy has inflicted, and continues to inflict, incalculable harm on the careers and family relationships of Slyper, Baquero, and large numbers of other foreign doctors and their American families.

b. Abuse of discretion. The court of appeals concluded that it lacked jurisdiction to determine whether the USIA had abused its discretionary authority. We have previously shown that this abdication of judicial responsibility relied on flawed premises. It will be helpful, we believe, to describe some of the arbitrary, capricious, and abusive procedures challenged in these cases.

The correct approach to the judicial function in reviewing discretionary determinations was des-

cribed by this court in Bowen v. American Hospital Assn., 106 S. Ct. 2101, 2113 (1986):

"Our recognition of Congress' needs to vest administrative agencies with ample power to assist in the difficult task of governing a vast and complex industrial Nation carries with it the correlative responsibility of the agency to explain the rationale and factual basis for its decision, even though we show respect for the agency's judgment in both."

The USIA has failed to comply with its responsibility "to explain the rationale and factual basis for its decision." The waiver applications were referred to USIA after the INS had decided, pursuant to the statutory design, that imposition of the home country residence requirement would impose exceptional hardship to the American spouses of the applicants. USIA returned the applications to the INS with an adverse recommendation, stating (in Dr. Baquero's case), J.A. 29, 60:

The USIA has determined that the program and policy considerations of the Exchange Visitor Program outweigh the hardship alleged for the American citizen spouse.

The laconic observation, invariably reiterated by USIA whenever it rejects a waiver application, ^{11/} merely repeats the language of its regulations, 22 CFR 514.32. The USIA has refused to specify what "program and policy considerations" it has relied on in these and in all cases, and it thus has not revealed "the rationale and factual basis of its decision." This generalized, boilerplate statement is designed to hide the actual basis for denial, rather than revealing it. And the USIA has refused to be more forthcoming. See J.A. 22a, 23.

Without a reasoned decision, the court and the affected applicants are left in the dark, and the court cannot determine whether an abuse of discretion has occurred. Indeed, representatives of USIA have publicly stated that their persistent refusal to reveal specifics is designed to defeat judicial

^{11/} The rejection in Dr. Slyper's case also referred to "the Congressional intent of Public Law 94-484" (the Doctors Law). J.A. 10. This reference confirms the erroneous reliance of USIA on supposed Congressional intent, previously discussed in this petition.

inquiry. 12/

Without a reasoned explanation, we are at a loss to understand how the program and policy of USIA would be affected if Dr. Slyper and Dr. Baquero were permitted to remain in the United States with their families. The alleged affect on program and policy is particularly puzzling in relation to Dr. Slyper, who was officially misinformed, before entering the United States and before he married a U.S. citizen, that he was not subject to the home country residence requirement.

The abusive policies of the USIA additionally were demonstrated in its dealings with Dr. Slyper and Dr. Baquero. They were not notified that their applications had been referred to the USIA, were

12/ Statements of USIA Assistant General Counsel Richard Fruchterman and USIA Attorney Mary Lynn, reported in American Immigration Lawyers Assn. (AILA) July-August, 1987 newsletter, p. 1075, 1076; and statement of Mr. Fruchterman in AILA Washington, D.C. Chapter June 1987 newsletter, p. 1.

not informed of any adverse evidence or given an opportunity to rebut it, and were not notified by the USIA of its decision. Indeed, the USIA contended in the court of appeals that waiver applicants have no rights. Br. 16-19.

We suggest that there is no legislative, judicial or public policy which precluded a challenge to such abusive policies and procedures.

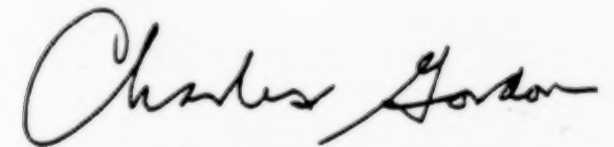
c. Constitutional challenge. The court of appeals agreed that constitutional violations could be addressed, but mistakenly declared that: "neither appellant, however, has made any such claim." It is true that the complaints primarily contended that the procedural violations were an abuse of discretion, but they also portrayed a violation of due process. Moreover, ancillary reliance on a due process claim was mentioned in our opening brief p. 18) and was more extensively discussed in our reply brief, under the caption: "These cases adequately charge procedural inadequacies entailing a denial of due process." (p. 14-16).

Slyper and Baquero, and their American families residing in the United States, are sheltered by the Fifth Amendment's guarantee of due process. They charged in the court below and they charge now that the procedural violations depicted in the record were a denial of due process. The court's statement that such a claim was not presented was clearly erroneous.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in cursive script, reading "Charles Gordon". The signature is written in dark ink and is positioned above a horizontal line.

Charles Gordon
Attorney for petitioners

December 1987

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 1987 I served the attached petition for certiorari by mailing 3 copies, first class postage prepaid, addressed as follows:

Solicitor General

Department of Justice

Washington, D.C. 20530

A handwritten signature in cursive script, reading "Charles Gordon". The signature is written in dark ink and is positioned above a horizontal line.

Charles Gordon

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5331

ARNOLD H. SLYPER, APPELLANT

v.

ATTORNEY GENERAL

No. 86-5335

MARCO BAQUERO, APPELLANT

v.

ATTORNEY GENERAL, et al.

Appeals from the United States District Court
for the District of Columbia

(D. C. Civil Action Nos. 82-3048 & 86-0692)

Argued February 2, 1987

Decided September 4, 1987

Charles Gordon for appellants.

Joseph A. Blundon, Assistant General Counsel, U.S.
Information Agency, of the bar of the District of Colum-

bia Court of Appeals, *pro hac vice*, by special leave of court, with whom *Richard K. Willard*, Assistant Attorney General, and *Donald A. Couvillon*, Attorney, U.S. Department of Justice, and *C. Normand Poirier*, Acting General Counsel, U.S. Information Agency, were on the brief, for appellees. *Joseph E. diGenova*, United States Attorney, and *Royce C. Lamberth*, *R. Craig Lawrence*, and *Diane M. Sullivan*, Assistant United States Attorneys, also entered appearances for appellees.

Before RUTH B. GINSBURG, BUCKLEY, and DOUGLAS H. GINSBURG, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* BUCKLEY.

BUCKLEY, *Circuit Judge*: The question before us in these consolidated cases is a narrow one; namely, whether a district court has jurisdiction to review a decision by the United States Information Agency not to recommend that two foreign doctors receiving training in the United States be granted a waiver of a statutory requirement that they return to their countries of origin for two years before being allowed to apply for foreign residency status in the United States. We affirm the district court's conclusion that it has no jurisdiction to hear the cases because there is no law for the court to apply.

I. BACKGROUND

These cases involve foreign medical graduate students who are in the United States under the auspices of the Exchange Visitor Program authorized by the United States Information Agency ("USIA"). 22 U.S.C. § 2452 (1982). Each student has married a United States citizen and seeks permanent resident status in this country through the waiver of a statutory requirement that he first return to his country of origin. Appellants claim that such a return will impose extraordinary hardship on their wives. These cases are governed by 8 U.S.C. § 1182(e) (1982), which requires, as one of the condi-

tions for the grant of a waiver, that it be favorably recommended by the Director of the USIA.

In the first case, the USIA denied appellant Slyper's request for a favorable recommendation because "[i]t is considered that what hardship may exist does not outweigh the program and policy considerations of the Exchange Visitor Program or the Congressional intent of Public Law 94-484." Denial of Waiver Request (May 21, 1984) (Joint Appendix ("J.A.") at 16). This denial was subsequently reaffirmed without further elaboration in two letters from USIA's General Counsel to Slyper's attorney. Letters from Richard Fruchterman to Charles Gordon (Sept. 4 and 10, 1984) (J.A. at 22 and 23).

Slyper brought suit alleging that the USIA's refusal to make a favorable recommendation was "arbitrary, unreasonable, and an abuse of discretion." Amended Complaint for Slyper Para. 22 (J.A. at 12). The district court dismissed the action because the statute vested the USIA with so "broad and vague" a mandate that it had "no law to apply." *Slyper v. Attorney General*, No. 82-3048, Memorandum Order at 4-5 (D.D.C. Mar. 26, 1986) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971)).

The district court dismissed appellant Baquero's complaint for the same reason. "The Court can find no significant factual difference in this case which might distinguish it from *Slyper* or otherwise provide this Court with jurisdiction in spite of the *Overton Park* doctrine." *Baquero v. Attorney General*, No. 86-0692, Memorandum Order at 3 (D.D.C. Mar. 27, 1986).

II. DISCUSSION

A. *The Statute and the Regulation*

The Immigration and Nationality Act, as amended, provides in pertinent part:

No person . . . [who] came to the United States . . . in order to receive graduate medical education or training, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a non-immigrant visa . . . until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States: *Provided*, That

[1] upon the favorable recommendation of the Director of the United States Information Agency,

[2] pursuant to the request of . . . the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), . . .

[3] the Attorney General may waive the requirement of such two-year foreign residence abroad

8 U.S.C. § 1182(e) (1982).

Our task is to decide whether the district court had subject matter jurisdiction to review the USIA Director's failure to make a favorable recommendation. The Immigration and Naturalization Commissioner's determination of exceptional hardship is not at issue, nor is the Attorney General's discretion to waive the repatriation requirement.

The USIA regulations repeat practically verbatim the waiver procedure in the statute, *see* 22 C.F.R. § 514.31 (1986), and provide the most general type of guidance for USIA action on receipt of a waiver request:

Upon receipt of a request for a recommendation of waiver of the two-year home country physical presence requirement . . . , the Director will review the policy, program, and foreign relations aspects

of the case and will transmit a recommendation to the Attorney General for decision.

22 C.F.R. § 514.32 (1986) (current version at 22 C.F.R. § 514.32 (1987)).

B. No Law to Apply

Citing *Overton Park*, 401 U.S. at 410, the district court concluded that the Director's statutory discretion was so broad that there is "no law to apply" and hence review is precluded by the Administrative Procedure Act ("APA"), 5 U.S.C. § 701(a)(2). *Slyper*, Memorandum Order at 4. The APA precludes a finding of reviewability based on its general reviewability provisions when "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (1982).

It is clear from the face of the statute that Congress intended to vest maximum discretion in the Director to oppose waivers requested by visiting physicians. The statute contains no standard or criterion upon which the Director is to base a decision to make or withhold a favorable recommendation. This broad delegation of discretionary authority is "clear and convincing evidence" of congressional intent to restrict judicial review in cases such as those we now face. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) ("[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review.").

This is not to say, nor does appellee contend, that the decisions of the USIA are never subject to review. The agency acknowledges that it is subject to review "[i]f a colorable claim were made of constitutional, statutory, or regulatory violation, or of fraud or lack of jurisdiction on the part of USIA." Brief for Appellee at 15. Neither appellant, however, has made any such claim. Appellants merely assert that the USIA Director abused his discretion. Therefore, our holding that the

district court lacked subject matter jurisdiction is limited to the issue of its jurisdiction to review the two USIA decisions for abuse of discretion.

This position is consistent with our recent decision in *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir.), *cert. granted*, 107 S. Ct. 666 (1986). *Abourezk* involved the denial of visas to certain foreigners who had been invited by U.S. citizens "to engage in open discourse with them within the United States." *Id.* at 1051. The State Department denied the visas under authority of the Immigration and Nationality Act of 1952 on the grounds that the applicants were "seek[ing] to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States." 8 U.S.C. § 1182(a)(27) (1982). We held that the APA provided the plaintiffs "a right of review extending to the statutory as well as the constitutional propriety of the State Department's application of section 1182(a)(27) to exclude the aliens invited by plaintiffs to the United States as speakers and meeting participants." *Id.*

What distinguishes *Abourezk* from this case is that the statute invoked by the State Department provided explicit guidelines for its exercise of discretion: "the statute lists thirty-three distinctly delineated categories that conspicuously provide standards to guide the Executive in its exercise of the exclusion power." *Abourezk*, 785 F.2d at 1051, *citing* 8 U.S.C. § 1182(a) (1982). By way of contrast, in the case before us the governing statute is devoid of guidance. Insofar as the Director is subject to any direction, it is to be found in the USIA regulation requiring that he review waiver applications in light of unspecified "policy, program, and foreign relations aspects of the case." 22 C.F.R. § 514.32 (1986). In short, we are presented with a classic case of a statute that "is drawn so that the court would have no meaning-

ful standard against which to judge the agency's exercise of discretion," *Heckler v. Chaney*, 105 S. Ct. 1649, 1655 (1985). As the regulation is equally devoid of meaningful direction, the court has no standard against which to assess the Director's exercise of discretion. *Accord Dina v. Attorney General*, 793 F.2d 473, 476 (2d Cir. 1986); *Abdelhamid v. Ilchert*, 774 F.2d 1447, 1449-50 (9th Cir. 1985). *Contra Chee-Chung Chong v. United States Information Agency*, 821 F.2d 171 (3d Cir. 1987). Accordingly, we hold that the district court correctly invoked the narrow exception provided in the APA for "agency action . . . committed to agency discretion by law."

III. CONCLUSION

The decisions sought to be overturned were committed by statute to the discretion of the USIA Director. As there is no law to apply in either case, the decisions of the district court to dismiss for lack of subject matter jurisdiction are

Affirmed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ARNOLD H. SLYPER,

PLAINTIFF,

V.

ATTORNEY GENERAL OF THE
UNITED STATES,

DEFENDANT.

CIVIL ACTION NO.

82-3048

MEMORANDUM ORDER

This case involves the issue of the reviewability of a decision of the United States Information Service (USIA) not to recommend plaintiff, an alien, for permanent resident status pursuant to 8 U.S.C. Sec. 1182(e). The action has previously been before the Court on a related issue, and the basic facts are outlined in an Opinion which the Court issued at that time. Slyper v. Attorney General, 576 F. Supp. 559 (D.D.C. 1983).

Briefly stated, plaintiff entered the United States as a nonimmigrant exchange visitor to receive a graduate medical education. Normally, individuals in plaintiff's category may not apply for permanent residency status unless they first return to their native land and remain there for a period of two years. ^{1/} There is, however, provision in the law for an exception to that rule which allows a waiver of the two-year foreign residency requirement, and this case involves the question whether this plaintiff is entitled to the benefit of that exception. In order to fall within the exception, an alien must overcome three procedural hurdles: (1) the Immigration and Naturalization Service must make a determination that the alien's departure from this country would impose exceptional hardship upon his spouse or child; (2) the USIA, considering the INS determination, must make a favorable recommendation to the Attorney General; and (3) the Attorney General

^{1/} 8 U.S.C. Sec. 1182(e).

must make his decision following that favorable recommendation. 2/

The earlier phase of this litigation revolved around the question whether the plaintiff had demonstrated exceptional hardship such as to require INS to forward the petition to USIA for its review. INS initially determined that no exceptional hardship was present. This court reversed and remanded the matter to the agency, finding an abuse of discretion, and directing the entry of a finding of exceptional hardship. Unfortunately, the INS, upon receipt of the Court's determination and order, failed to act in an appropriate manner. Instead of making and forwarding to the USIA a form recording its finding of exceptional hardship, it instead forwarded this Court's opinion and Order. USIA thereupon seized upon this fact to deny plaintiff's request, at least in part on the basis that the INS had not itself made

2/ Id.

the requisite exceptional hardship finding (as USIA understood the statute to require). Ultimately, after further Court intervention, the problem was resolved: plaintiff amended his complaint to include USIA as a defendant, and the INS, after some delay, forwarded a new form to USIA in which it (rather than only the Court) made the requisite exceptional hardship finding. Upon receiving the new form, USIA again denied plaintiff's waiver request.

The issue now before the Court revolves around this failure of USIA to make a favorable recommendation on plaintiff's behalf to the Attorney General, a failure which plaintiff characterizes as arbitrary, capricious, and an abuse of discretion. 8 U.S.C. Sec. 1182(e) provides that "upon the favorable recommendation of the Director of the United States Information Agency," the Attorney General may waive the requirement of two-year foreign residence. The statute contains no standards or criteria upon which the Director of the USIA is to base his recommenda-

tion or his failure to make a recommendation.^{3/}

If there is to be any basis for federal court jurisdiction with respect to the USIA's failure to act, it can rest realistically only on the Administrative Procedure Act, 5 U.S.C. Sec. 701(a)(2).

However, the APA does not confer jurisdiction to review alleged administrative abuses of discretion when the governing statute is drawn in such broad terms that "there is no law to apply." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971); Local 1219, AFGE v. Donovan, 683, F.2d 511, 515 (D.C. Cir. 1982); Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1043 (D.C. Cir. 1979).

^{3/} The legislative history does not supply such standards nor does it indicate that the statute was to be construed to provide for leniency in favor of individuals in plaintiff's category. On the contrary, foreign physicians are the only professional group singled out by Congress as having to promise that they would return home for at least a two-year period. Public Law 97-116, 95 Stat. 1611 (1981; 8 U.S.C. Sec. 1182(j)). Newton v. INS, 736 F.2d 336, 341, (6th Cir. 1984). In addition, other legislative provisions expressly indicate that physicians are not to be given preference in immigration matters. See generally, Public Law 94-484, 90 Stat. 2243 (1976).

The statute here under consideration vests the widest possible discretion in the USIA with respect to recommendation regarding physician nonimmigrants. That agency is directed to take into account only the "policy, program, and foreign relations aspects of the case" Not only are these matters with respect to which a court would have difficulty in any event to substitute its judgment for that of the Executive Branch agencies entrusted by law with the power to decide, ^{4/} but the mandate is so broad and vague that there is "no law to apply."

Although the administrative agencies which have had involvement in this case have hardly exhibited an abundance of good faith (see supra), the Court may not on that account exercise jurisdiction where by law no such jurisdiction exists. In short, the

^{4/} 22 C.F.R. Sec. 514.32 (1984). Operation of the statute in the foreign relations sphere is buttressed by the fact that initially the functions at issue were exercised by the Secretary of State. See also United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952).

Court is forced to dismiss the action insofar as it seeks relief against the USIA and its officials. Moreover, since a favorable recommendation by USIA is a prerequisite for further activity by the Attorney General and for the ultimate relief sought by Plaintiff, the action must and will be dismissed for lack of jurisdiction. ^{5/}

For the reasons stated, it is this 26th day of March, 1986 ORDERED that this action be and it is hereby dismissed.

HAROLD H. GREENE

UNITED STATES DISTRICT JUDGE

^{5/} See Abdelhamid v. Tichert, No. 84-2313, slip op. at 6-8 (9th Cir. Oct. 28, 1985) (no subject matter jurisdiction for district court to review USIA failure to make favorable waiver recommendation under 8 U.S.C. Sec. 1182(e)).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
UNITED STATES COURTHOUSE
333 CONSTITUTION AVENUE, N.W.
WASHINGTON, D.C. 20001-2866

GEORGE A. FISHER
CLERK

GENERAL INFORMATION
(202) 535-3300

September 4, 1987

RE: 86-5331 - ARNOLD H. SLYPER V. ATTORNEY GENERAL
86-5335 - MARCO BAQUERO V. ATTORNEY GENERAL, ET AL

Dear Counsel:

Enclosed herewith are three (3) copies of the
opinion in the above entitled case.

Please note that the judgment has been entered
on the same date as the opinion and is for mandate
purposes only.

Sincerely,

Denise C. Thomas
Opinions Clerk

Enclosures

DISTRIBUTION: